UNITED STATES OF AMERICA v. OMAR KHADR	**Defense Motion** to Dismiss due to Unlawful Influence (Senior DoD Officials) 31 July 2008

1. Timeliness: This motion is filed within the timeframe established by Rule for Military Commission (R.M.C.) 905.

2. Relief Sought: The defense requests that all charges be dismissed on the grounds of unlawful influence. In the alternative, the defense requests that the Convening Authority and Legal Advisor to the Convening Authority be disqualified from further participation in this case.

3. Burden and Standard: As the moving party, the defense bears the burden of establishing any factual issues necessary to resolve the motion by a preponderance of the evidence. R.M.C. 905(c)(2)(A). As to the merits, "the defense has the initial burden of raising the issue of unlawful command influence. … Once the issue of unlawful command influence has been raised, the burden shifts to the government to demonstrate *beyond a reasonable doubt* either that there was no unlawful command influence or that the proceedings were untainted." *United States v. Lewis*, 63 M.J. 405 (C.A.A.F. 2006) (emphasis added).

4. Facts:

a. Air Force Colonel (COL) Morris Davis had an interview for the position of Chief Prosecutor for military commissions with Pentagon General Counsel William James ("Jim") Haynes in August 2005. *United States v. Hamdan*, Military Commission Record of Trial at 721-25 [hereinafter *Hamdan* R.] (testimony of COL Davis) (Attachment A). During the interview, Mr. Haynes expressed the view that the military commission "trials will be the Nuremburg of our times." *Id.* at 724. COL Davis said to him that if there were some acquittals in the military commissions, it would at least show the legitimacy of the process. *Id.* at 724-25. Wide eyed, Mr. Haynes responded, "We can't have acquittals. If we've been holding these guys for years, how are we going to explain acquittals? We can't have acquittals. We've got to have convictions." *Id.* at 725; *see also* Morris D. Davis, *AWOL Military Justice*, L.A. Times, Dec. 10, 2007 [hereinafter *AWOL Military Justice*] (Attachment B).

b. The first year COL Davis was the Chief Prosecutor he did not feel that there was external influence exerted over his office. *Hamdan* R. at 730. When the high-value detainees were transferred to Guantanamo Bay in September 2006, that changed. *Id.* And outside influence increased when the nomination of Mr. Haynes was withdrawn for a seat on the Fourth Circuit Court of Appeals in January 2007. *See Hamdan* R. at 731.

c. Deputy Secretary of Defense Gordon England chaired a group called the Senior Oversight Group (SOG) that was created to oversee issues relating to the high-value detainees.

COL Davis attended a SOG meeting near the end of September 2006 to discuss the timeline for charging high value detainees. Secretary England, Mr. Haynes, and other high level personnel attended the meeting. Secretary England said "there could be some real strategic political value in charging some of the high-value detainees before the [November 2006] elections and we need[] to think about who we can charge, what we can charge them with, and when we can charge them." *Hamdan* R. at 737-39; *United States v. Jawad*, Military Commission Record of Trial at 5-6 [hereinafter *Jawad* R.] (testimony of COL Davis) (Attachment C). Since the Nazi Saboteur cases "were done in a matter of weeks . . . they couldn't understand why we couldn't move these cases quicker." *Hamdan* R. at 737-39; *Jawad* R. at 5-6.

d. Concern was also expressed during the SOG meetings in late 2006 and early 2007 that if the military commission process was not moving with some momentum before election of the next President, a new administration in 2008 would likely close the process down. A high value case such as that of Khalid Sheik Mohamed was believed necessary for the commission process to have sufficient momentum by November 2008. *See Hamdan* R. at 753; Josh White, *Ex-Prosecutor Alleges Pentagon Plays Politics*, Wash. Post, Oct. 20, 2007, at A03 [hereinafter *Pentagon Plays Politics*] (Attachment D).

e. Mr. Haynes initially shied away from direct involvement in the military commissions. But when his nomination to the U.S. Court of Appeals for the Fourth Circuit was withdrawn on 9 January 2007, he began to take a more active role in the process. *See Hamdan* R. at 731. The day Mr. Haynes' nomination was withdrawn, he called COL Davis and asked, "How quickly can you charge David Hicks?" *Hamdan* R. at 731. COL Davis explained that Hicks could not be charged until the Manual for Military Commissions and Regulations had been issued and until a Convening Authority had been appointed. *Id.* at 732. None of those things had happened at that point. *Id.* In fact, COL Davis didn't even know what the elements of the offenses were going to be. *Id*. Mr. Haynes then asked how quickly Hicks could be charged after the Manual was issued. *Id.* COL Davis "explained that it would take about two weeks. [Mr. Haynes'] opinion was two weeks was far too long; we had to do it quicker." *Id.* at 733. The day before, Department of Justice lawyers called COL Davis to request the prosecution's assistance in preparing for a meeting at the Australian Embassy regarding Mr. Hicks' case. *Id.* at 730-31

f. During the 9 January call, Mr. Haynes also asked COL Davis if there were other cases that could be charged at the same time as Hicks. *Id.* COL Davis interpreted this to mean that charging Hicks alone would look odd, especially since the system hadn't been set up yet, and that the public perception would be better if Hicks were charged as part of a group. *Id.*

g. Later that day, Daniel Dell'Orto, Principal Deputy General Counsel for the Department of Defense, called COL Davis and told him "to disregard everything Jim told you." *Id.* at 734. Mr. Dell'Orto explained that "I took a wire brush to him [Mr. Haynes] [and] explain[ed] to him that he can't be having those kinds of conversations with you." *Id.* But after this call, Mr. Haynes continued to call COL Davis to discuss the timeline for charging detainees. *See, e.g., id.* at 734. And Mr. Haynes had a draft copy of the elements for material support for terrorism from the draft Manual for Military Commissions forwarded to COL Davis so he could start drafting the Hicks' charges right away. *Id*. at 735.

h. Nine days after these calls, the Manual for Military Commissions was issued on 18 January 2007. "[T]wo weeks to the day after that, Mr. Haynes called [COL Davis] and said, 'Where are the charges on Hicks?'" *Id*. at 734. COL Davis explained that the charges were going through a vetting process and that a convening authority had not yet been appointed, so there was no person to whom the charges could be forwarded. *Id*. at 734-35.

i. As a result of pressure from Mr. Haynes, charges against David Hicks, Omar Khadr and Salim Hamdan were sworn on 2 February 2007, before a convening authority had been appointed and before the Manual or Regulations for military commissions had been published. *See United States v. Hicks*, Charge Sheet (Attachment E); *United States v. Khadr* Sworn Charge Sheet (Attachment A to D008, Def. Mot. to Dismiss); *United States v. Hamdan*, Charge Sheet (Attachment F); *Hamdan* R. at 736-37, 744; Dept of Defense News Release No. 151-07, Feb. 7, 2007 (Attachment G) (announcing appointment of Convening Authority). Absent the pressure from Mr. Haynes, COL Davis would not have charged these detainees on two February because the system had not yet been set up. *Hamdan* R. at 736-37. In fact, he would not have charged Mr. Hicks at all. *Id.* at 782. Mr. Khadr and Mr. Hamdan were picked to go along with Mr. Hicks because they had been charged in the previous system so their cases were already developed and had counsel assigned for a while. *Jawad* R. at 6-7. COL Davis has analogized charging the detainees while the system was still being built to "the train leaving the station before the tracks were laid" and "trying to play ball in the ballpark while you [are] still putting in the bases and hiring an [u]mpire." *Id*. at 737.

j. Hicks' trial was conducted at the end of March 2007. "[H]is case was over and done before there was a regulation for trial by military commission." *Jawad* R. at 8.

k. Brigadier General (BG) Thomas Hartmann assumed the position of Legal Advisor to the Convening Authority at the beginning of July 2007. COL Davis met him briefly and then was at home during most of July recovering from surgery. *Hamdan* R. at 750; *Jawad* R. at 9-10. His subordinates asked him to come back to work quickly because BG Hartmann was "taking over the office." *Jawad* R. at 18. COL Davis has since described BG Hartmann's management of the prosecution office as "nano-management" in a manner "some would consider cruelty and maltreatment." *Hamdan* R. at 750.

l. On 5 or 6 July, BG Hartmann had a meeting with the Deputy Chief Prosecutor, Lieutenant Colonel (LTC) William Britt. Sworn Statement of LTC Britt, 7 Sept 07 at 5 [hereinafter Britt Statement] (Attachment H). During the meeting BG Hartmann told him that "I am going to consider my tour here, my mission here, a complete failure unless we successfully prosecute the detainees in Guantanamo Bay." *Id*. "Almost immediately Hartmann asked for a complete report on everything 'A' to 'Z' that had to do with our prosecutorial operation, and immediately he requested a series of written documents that in the past we had been advised and our research had indicated should not be provided to the legal advisor . . . because they would be discoverable." *Id*. BG Hartmann also asked to receive a listing of the weaknesses of each case. *Jawad* R. at 18; COL Davis 23 Sept 07 Complaint, para. 11 [hereinafter Davis Complaint] (Attachment I). COL Davis and prosecutors in his office believed this was a bad idea because the information may become discoverable to the defense. *Jawad* R. at 18; Davis Complaint, para. 11. Due to these concerns, "it was agreed that we would provide General Hartmann the information he wanted but not necessarily in the format that he desired the information in, and

with a full explanation to accompany that . . . particular disclosure." Britt Statement at 6. BG Hartmann received detailed briefings on the cases from the lead prosecutor assigned to each case. *Hamdan* R. at 751; *Jawad* R. at 38; Davis Complaint para. 11, 16; Britt Statement at 10. The briefings, however, did not include weaknesses of the cases. COL Davis, who was still on convalescent leave, exercised his judgment as Chief Prosecutor and instructed LTC Britt to instead provide Brig. Gen. Davis with the "general nature of the types of problems we encounter preparing cases rather than a roadmap of case-specific problems." Davis Complaint, para. 14; *see also Jawad* R. at 19. BG Hartmann was very angry about this and told COL Davis on 16 July 2007 that "people get fired for that type of thing", referring to COL Davis ordering a subordinate to disobey the order of a general officer, and that "it will not happen again. . . . Is that clear . . . Colonel!" Davis Complaint, para. 14; *Jawad* R. at 20.

m. On 9 July 2007, BG Hartmann held a meeting with the prosecution office. *Jawad* R. at 11. He explained that he wore two hats. One was to provide "independent legal advice to the Convening Authority" and the other was to be "in charge of the prosecution." *Id*. It later became clear to COL Davis that BG Hartmann viewed himself as being on the prosecution team. *Id.* at 12; Davis Complaint, para. 16. And LTC Britt "did very clearly feel . . . that the duties and the responsibilities that previously were COL Davis's were being taken over." Britt Statement at 13. In fact, when Col Davis returned from convalescent leave he began doing some of the Deputy's work since BG Hartmann was doing the Chief Prosecutor's work. *Id*. COL Davis later suggested that the Legal Officer was "routinely engaged with the OCP in crafting charges, mustering evidence, developing trial strategy, honing prosecutor's skills, and sequencing cases." Davis Complaint, para. 6(b)(i).

n. On 10 July 2007, BG Hartmann sent COL Davis an email, asking "what type of trial advocacy program we had in place, how we prepared trial notebooks, and how we conducted pretrial 'murder boards.'" Davis Complaint, para. 9. BG Hartmann was upset because there was not a "robust training program" for prosecutors. *Jawad* R. at 12; *Hamdan* R. at 750. He imposed a deadline of 25 July for implementing a training program. *Jawad* R. at 12; *Hamdan* R. at 750; Davis Complaint, para. 12. Given that all the prosecutors in the office had from one to five tours in the courtroom and given their limited time and resources, COL Davis believed their time was better spent preparing cases than creating and participating in a lengthy training program. *Id.* at 12-13.

o. BG Hartmann was also involved in assigning prosecutors to cases. If he thought one counsel was not a strong advocate, he would ask to have another attorney assigned as lead counsel. *See Hamdan* R. at 751.

p. BG Hartmann's management of the prosecution office also included defining "the sequence in which cases would be brought." *Pentagon Plays Politics* at A03. On 18 July 2007, BG Hartmann called LTC Britt and told him that he (BG Hartmann) "was going to pick the next cases and they were going to be cases that will capture the public's imagination." *Jawad* R. at 29-30; Davis Complaint, para. 15; Britt Statement at 11. BG Hartmann later told COL Davis to charge cases that were "sexy" or had "blood on them." *Hamdan* R. at 752. He specifically liked the case against Mohammed Jawad, which involved the alleged throwing of a hand grenade at two U.S. servicemen and their interpreter. *Hamdan* R. at 753; *Jawad* R. at 46-47. As a result, LTC Britt "reprioritized cases." Britt Statement at 12.

q. In July 2007, the prosecution in Mr. Khadr's case filed a brief with the Court of Military Commission Review (CMCR) setting forth the reasons they believed Judge Brownback erred in dismissing the charges in this case. "The Department of Justice was not satisfied with the caliber of the brief." *Jawad* R. at 15. BG Hartmann had communications with the Department of Justice and LTC Britt about whether to supplement or substitute the brief. *Id*. at 15-16; Britt Statement at 6-8.

r. Once COL Davis returned to the office near the end of July 2007, BG Hartmann called him nearly every day to discussion prosecution of the cases. *See Hamdan* R. at 752.

s. In August 2007, BG Hartmann held weekly meetings at which the following people were present: Mr. Chapman from the Convening Authority's office, CIA, FBI, and CITF representatives as well as COL Davis, Fran Gilligan, LTC Britt, Bob Swain, George Toscas from the prosecution office. *Jawad* R. at 40. At the 15 August meeting, BG Hartmann "leaned forward and in kind of the angry tone" ordered COL Davis to have three cases ready to charge the day the CMCR issued the Khadr decision in the government's appeal of COL Brownback's dismissal of the charges. *Id*. at 41; Davis Complaint, para. 26.

t. Also in August 2007, BG Hartmann told COL Davis that he was unhappy with the speed with which the prosecution was bringing charges. *Hamdan* R. at 758. BG Hartmann emphasized that it was imperative to "pick up the pace" otherwise "things were going to implode." *Id.*; *Pentagon Plays Politics*. COL Davis explained that the declassification process was taking time. *Hamdan* R. at 758. His view was that the evidence should be declassified if possible so that the proceedings would be transparent. *Id*. BG Hartmann preferred to use classified evidence in closed proceedings. *Hamdan* R. at 758-59; *Pentagon Plays Politics* at A03. Brushing aside COL Davis' concerns that closed trials would tend to undermine the legitimacy of the military commissions, BG Hartmann pressured him to bring cases that could not be tried in public. "He said, the way we were going to validate the system was by getting convictions and good sentences." *Pentagon Plays Politics* at A03; *see also Hamdan* R. at 758; Davis Complaint, para. 14. COL Davis felt that he "was being pressured to do something less than full, fair and open." *Pentagon Plays Politics* at A03. The Convening Authority later expressed to COL Davis her agreement with BG Hartmann that cases should not be delayed until evidence for them could be declassified. *Hamdan* R. at 761.

u. BG Hartmann also injected himself into deciding what types of evidence would be used to obtain convictions. COL Davis had a policy against using evidence obtained through water-boarding or that was otherwise unreliable. *See Hamdan* R. at 755-56. BG Hartmann questioned COL Davis' authority as Chief Prosecutor "to make . . . decisions about what evidence the prosecution would offer" since people senior to COL Davis disagreed with him. *Id.* at 755. BG Hartmann took the position that prosecutors should not make the decision about whether evidence was reliable. *Id*. He insisted that evidence derived from water-boarding should be offered and the military judges should "sort it out." *Id*.

v. Months later, during testimony before the Senate Judiciary Committee, BG Hartmann reiterated his position that the military judge—not the prosecutor—would be the gatekeeper for such evidence. In response to a question from Senator Feinstein as to the admissibility of evidence obtained from water-boarding, BG Hartmann twice declined to answer

because "the discretion of a prosecutor is inappropriate to be dealt with in public." *The Legal Rights of Guantanamo Detainees: What Are They, Should They Be Changed, and is an End in Sight?: Hearing Before Subcomm. on Terrorism, Technology and Homeland Security of the S. Comm. on the Judiciary* 110th Cong. (Dec. 11, 2007) at 9 (statement of BG Hartmann) [hereinafter Hartmann Senate Testimony] (attachment J). When pressed again about whether evidence derived from water-boarding will be used, he eventually responded that it will up to the judge to decide whether evidence derived form water-boarding is admissible. *Id.* at 9-10.

w. From the beginning of his involvement with the prosecution, BG Hartmann's emails to COL Davis used language suggesting he saw himself as being part of the prosecution. *Jawad* R. at 12. For example, on 13 July 2007, BG Hartmann sent an email to COL Davis stating, in part:

> As we move from a preparatory and investigative stage in the cases to seeing the doors of the courtroom, our focus must turn to heightening the litigation skills of the attorneys who will present the cases. . . . The key for us will be regular and repeated in-house attention to the presentation of various parts of the trial – opening, closing, sentencing, voir dire, direct, cross, motions – in front of people who will give honest, concrete feedback. . . . I would like to see a draft of this by 25 July 07.

Davis Complaint, para. 12 (emphasis added by COL Davis).

x. On 23 August 2007, COL Davis submitted a formal complaint regarding BG Hartmann's interference in the prosecution office to the Convening Authority. Davis Complaint; *Hamdan* R. at 760; *Jawad* R. at 44. When he called the Convening Authority a week later to inquire as to the status of his complaint, she informed him that BG Hartmann did not work for her and that the complaint had been forwarded to BG Hartmann's boss, Mr. Haynes. *Hamdan* R. at 760-61. The following week, the Convening Authority told COL Davis that BG Hartmann had been recused from performing legal advisor duties until the complaint was resolved. *Jawad* R. at 44.

y. Around 10 September 2007, BG Hartmann held another weekly meeting with the prosecution and others even though he was still recused. *Id.* at 42-45. COL Davis told him that the three cases the prosecution planned to have ready when the CMCR issued the Khadr decision were al Bahlul, al Qosi and al Darbi. *Id.* at 42. But BG Hartmann insisted that the next case charged be Jawad. By this time, the prosecution had thoroughly developed 25 or 26 cases, but Jawad was not among those. *Id*. at 46. COL Davis testified in Jawad's military commission that Jawad "went from the freezer to the front burner after General Hartmann arrived." *Id.* at 47.

z. COL Davis' 23 August complaint resulted in a formal investigation chaired by Brigadier General Clyde J. Tate, JAGC, USA, which concluded that there had been no unlawful influence on the Chief Prosecutor by the Legal Advisor because the Legal Advisor was authorized by regulation to influence the Chief Prosecutor. Memorandum from Brigadier General Clyde J. Tate to the Hon. Jim Haynes, 17 Sept 07 at 5(d) (Attachment K).

aa. On 3 October 2007, Mr. England issued a memorandum establishing a chain of command for the Office of Chief Prosecutor. Memorandum for Chief Prosecutor, Office of

Military Commissions, 3 Oct 07 (Attachment L). It established that COL Davis reported to BG Hartmann. A separate memo established that BG Hartmann reported to the Deputy General Counsel who in turn reported to Mr. Haynes. Memorandum for Legal Advisor to the Convening Authority for Military Commissions, 3 Oct 07 (Attachment M).

bb. COL Davis resigned the next day. He had concluded "that the system had become deeply politicized" and that he could not do his job "effectively or responsibly." *AWOL Military Justice*; *see also Hamdan* R. at 767.

cc. Charges against Mohammed Jawad were sworn five days later on October 9, 2007. *United States v. Jawad*, Charge Sheet (Attachment N).

dd. On 9 May 2008, based largely on the facts listed above, the military commission in *United States v. Hamdan* disqualified BG Hartmann from acting as the Legal Advisor in Hamdan's case on the basis of unlawful influence prohibited in MCA § 949b(a)(2)(C). *United States v. Hamdan*, Ruling on Mot. to Dismiss (unlawful influence), D-026 at 11 (Attachment O).

5. Argument:

a. The express prohibition of unlawful influence (or the appearance thereof) by the Military Commissions Act is central to securing the fairness and propriety of military commission proceedings.

(1) A precursor to the statute applicable to military commissions, Article 37 of the UCMJ prohibits, among other things, any person subject to the UCMJ from attempting to "coerce or, by any unauthorized means, influence the action" of courts-martial or military tribunals. 10 U.S.C. § 837. The Military Commissions Act of 2006 ("MCA") *broadens* the protections of Article 37, extending the scope of the prohibition to "any person" – not only those subject to the UCMJ – and prohibits attempts to coerce or influence the "exercise of professional judgment by trial counsel or defense counsel" – not just the action of court-martial or military tribunals. MCA § 949b(a)(2)(C). There could be no stronger evidence of the seriousness with which Congress viewed the threat of unlawful influence in connection with military commission proceedings and its desire to eliminate comprehensively this "mortal enemy of military justice." *United States v. Thomas*, 22 M.J. 388, 393 (C.M.A. 1986).

(2) Under established military case law applying Article 37 in the context of court-martial proceedings, the defense bears the initial burden of raising the issue of unlawful influence. *United States v. Lewis*, 63 M.J. 405, 413 (C.A.A.F. 2006). The defense meets this burden by showing facts, "which, if true, constitute unlawful command influence, and that the alleged unlawful command influence has a logical connection to the court-martial, in terms of its potential to cause unfairness in the proceedings." *Id.* (citation omitted). Once the issue of unlawful influence has been raised, the burden shifts to the government to demonstrate beyond a reasonable doubt either that there was no unlawful influence or that the proceedings were untainted. *United States v. Stoneman*, 57 M.J. 35, 41 (C.A.A.F. 2002).

(3) Even if actual unlawful influence is not shown, relief is still warranted where there is an appearance of unlawful influence. *Id.* at 42 ("disposition of an issue of

unlawful command influence falls short if it fails to take into consideration the concern of Congress and this Court in eliminating even the appearance of unlawful command influence at courts-martial"); *see also* Regulation for Trial by Military Commission [hereinafter M.C. Reg.] 1-4 ("All convening authorities, *legal advisors*, trial counsel, and others involved in the administration of military commissions must avoid the appearance or actuality of unlawful influence . . . .") (emphasis added). The appearance of unlawful influence is "as devastating to the military justice system as the actual manipulation of any given trial." *United States v. Lewis*, 63 M.J. 405, 406 (C.A.A.F. 2006) (citing *United States v. Simpson*, 58 M.J. 368, 374 (C.A.A.F. 2003)). Even in the absence of actual unlawful influence, the appearance of unlawful influence may place an "intolerable strain on public perception of the military justice system." *United States v. Wiesen*, 56 M.J. 172, 175 (C.A.A.F. 2001). The appearance of unlawful influence exists where an objective, disinterested observer, fully informed of all the facts and circumstances, would harbor a significant doubt about the fairness of the proceeding. *Lewis*, 63 M.J. 405, 415 (C.A.A.F. 2006).

b. The Convening Authority and her Legal Advisor must be impartial and independent in exercising authority.

(1) The convening authority controls critical aspects of a military commission. For example, she determines whether charges will be referred against an accused and, if so, whether charges will be referred capital; approves or denies requests for expert witnesses; appoints members who decide guilt or innocence and sentence those convicted; and may overturn convictions or reduce the sentences of a military commission. 10 U.S.C. §§ 948i, 950b, 950i; R.M.C. 201(d)(1), 407(a), 703(d). A legal advisor "provides legal advice and recommendations to the convening authority, similar in nature to that provided by a staff judge advocate under the Code" and fulfills the responsibilities of that position as required by the Manual for Military Commissions. R.M.C. 103(a)(15).

(2) Convening authorities and their legal advisors who carry out these important statutory responsibilities must "be, and appear to be, objective." *United States v. Taylor*, 60 M.J. 190, 193 (C.A.A.F. 2004) (citing *United States v. Dresen*, 47 M.J. 122, 124 (C.A.A.F. 1997); *United States v. Coulter*, 3 U.S.C.M.A. 657, 660 (C.M.A. 1954)); *see also United States v. Argo*, 46 M.J. 454, 459 (C.A.A.F. 1997) (*citing* 10 U.S.C. § 806(c) (2006) ("A Staff Judge Advocate is not a prosecutor and is usually in a position to give neutral advice."); *United States v. Hagen*, 25 M.J. 78, 86 (C.M.A. 1987) (Sullivan, J., concurring) (explaining a convening authority "must be impartial and independent in exercising his authority"). The Convening Authority's role is therefore compromised when she or her agents usurp prosecutorial functions or behave in a manner inconsistent with exercising impartial and independent authority. *See Coulter*, 3 U.S.C.M.A. at 659-60 (C.M.A. 1954). "[H]uman behavior is such, that when a person, interested in the outcome of a trial, is called upon to pass on the results of that trial, his decision is necessarily different from that of a person who had no interest in the matter." *Id.* at 659; *id.* at 660 ("However honest his intentions, an inherent conflict arises between a reviewer's duty to dispassionately advise the convening authority on the appropriateness of the sentence, and the prosecutor's innate desire to press for a substantial sentence as an accolade for his efforts in securing the conviction."); *cf.* R.M.C. 1106(b) ("No person who has acted as member, military judge, trial counsel, assistant trial counsel, defense counsel, or associate or assistant defense counsel, or investigating officer in any case may later act as a legal advisor to

any reviewing or convening authority in the same case."); R.M.C. 406(b), Discussion ("Grounds for disqualification [of the legal advisor] in a case include previous action in that case as investigating officer, military judge, trial counsel, defense counsel or member."); *United States v. Clisson*, 17 C.M.R. 277, 280 (C.M.A. 1954) (regarding staff judge advocate who also served as trial counsel in the case the court said "we do not doubt the personal integrity of trial counsel, but we cannot overlook the fact that his previous antagonistic role prevents his exercising that degree of impartiality required by the Code"). The Court of Appeals for the Armed Forces has disqualified legal advisors from performing statutory duties when they have not remained "neutral" in fact or in appearance. *See, e.g.*, *Taylor*, 60 M.J. at 194.

c. Due to differences between courts-martial and military commissions, the MCA gave the Office of the Chief Prosecutor a level of independence greater than prosecution offices handling courts-martial.

(1) In enacting the MCA, Congress recognized that there are significant differences between the nature of military commissions and courts-martial. The undeniable political interests in criminal prosecution of our nation's enemies places a greater premium on insulating both the prosecution and defense for military commissions from attempts by anyone to coerce or influence their "exercise of professional judgment." *Compare* 10 U.S.C. § 837 *with* 10 U.S.C. § 949b. To avoid even the suggestion of "victor's justice", Congress enacted section 949b of the MCA. One of the practical effects of this section is that the Convening Authority's authority over the military commissions process begins only after the prosecution prefers charges. *See* 10 U.S.C. § 948i(b), § 949b, R.M.C. 406(a), 601(d); M.C. Regs. 3-2(g), 3-3; 4-2.

(2) The differences between courts-martial and military commissions begin with the different nature of the accused, convening authorities and missions in each of the systems. One of the central purposes of the UCMJ was to strike a "delicate balance between justice and command discipline…." *United States v. Littrice*, 3 U.S.C.M.A. 487, 492 (C.M.A. 1953); Chief Judge Andrew S. Effron, Evolving Military Justice 172, Naval Institute Press (2002). During the congressional hearings on the UCMJ, "a sharp conflict arose between those who believed the maintenance of military discipline within the armed forces required that commanding officers control the courts-martial proceedings and those who believed that unless control of the judicial machinery was taken away from commanders military justice would always be a mockery." *Littrice*, 3 U.S.C.M.A. at 491. In the UCMJ, "Congress liberalized the military judicial system but also permitted commanding officers to retain many of the powers held by them under prior laws." *Littrice*, 3 U.S.C.M.A. at 491; *United States v. Hardin*, 7 M.J. 399, 404 (C.M.A. 1979) (The authority given to the staff judge advocate and the convening authority in military justice was intended to "establish the proper relationship between the legitimate needs of the military and the rights of the individual soldier"). In drafting the MCA, Congress did not have to strike the "delicate balance" between justice and command discipline. Because command discipline is not at issue in the case of Guantanamo detainees, Congress was left to focus solely on justice. Accordingly, Congress retained a diminished convening authority in the MCA, omitting all references to commanding officers and many of the powers retained for commanding officers under the UCMJ.

(3) Second, unlike a traditional convening authority who performs this function as a duty incidental to his broader military mission, the military commission convening

authority, who in practice have both been lawyers, is a political appointee. R.C.M. 103(6); R.M.C. 103(a)(8). The nature and history of the modern military commissions process since the first of three versions was created several years ago demonstrate the military commissions are inherently subject to political influence. It is not surprising that Congress would want to attempt to ensure that the prosecutorial arm of the military commissions was independent from the political arm of the government, including the politically appointed Convening Authority.

(4) Indeed, the MCA created the offices of Chief Prosecutor and Chief Trial Counsel, offices unknown for courts-martial. 10 U.S.C. § 948k(d). The Regulation for Trial by Military Commission recognizes the principle of prosecutorial discretion and permits prosecutors to bring or not bring charges as they see fit. M.C. Reg. 3-2(a). Among the considerations that prosecutors may use in making this determination is the availability and admissibility of evidence and issues involving classified information. M.C. Reg. 3-2(b)(8), (10). The Chief Prosecutor is tasked with supervising prosecutors. M.C. Reg. 8-6(a). Prosecutors are tasked with initiating the charging process, although anyone subject to the Code may swear charges. M.C. 3-1, 3-2.

(5) By contrast, the responsibilities of the Convening Authority and those of her Legal Advisor are not triggered until after preferral. The earliest authority in the commission process that the MCA vests in the convening authority is selection of members. 10 U.S.C. § 948i(b). The Secretary of Defense delegated his statutory authority to refer charges to the Convening Authority in R.M.C. 407(a). *See also* 401(a). The Legal Advisor is not mentioned in the MCA,[1] but even under the Manual and Regulation the responsibilities of that position don't kick in until after preferral (with the exception of ratings and supervisory duties the Secretary gave the Legal Advisor).[2] *See* R.M.C. 406(a); R.M.C. 601(d) ("The convening authority or legal advisor shall not be required before charges are referred to resolve legal issues, including objections to evidence, which may arise at trial."); M.C. Reg. 3-2(g) ("trial counsel or Chief Prosecutor shall provide a copy of the sworn charges to the legal advisor of the convening authority. . . within 24 hours after the charges are sworn"); M.C. Reg. 3-3 ("[t]rial counsel will forward charges with the accompanying materials or other evidence supporting the charges through the Chief Prosecutor to the legal advisor of the convening authority . . . with a transmittal letter" including various information regarding the charges and evidence supporting the charges); M.C. Reg. 4-2 ("The charges and specifications are forwarded to the legal advisor from the Chief Prosecutor.").

[1] The position of Legal Advisor was created by the Secretary of Defense. *See* R.M.C. 104(15).

[2] See paragraph 5(f), *infra*, explaining that the Secretary of Defense cannot void the prohibitions of unlawful influence by creating a position through regulation and then authorizing the person in that position to perform duties amounting to an attempt to coerce or, by any unauthorized means, influence the professional judgment of trial counsel, which is prohibited by MCA § 949b(a)(2)(C).

d. Department of Defense officials charged with overseeing the military commissions have unlawfully influenced the Chief Prosecutor with respect to Mr. Khadr's case in particular.

(1) R.M.C. 104 states that "[A]ll persons, even those not officially involved in the commissions process, must be sensitive to the existence, or appearance, of unlawful influence, and must be vigilant and vigorous in their efforts to prevent it and to respond appropriately to its occurrence." Rule 104, Manual for Military Commissions (2007 ed.); 10 U.S.C. § 949 (2006 ed.). Unfortunately, officials, including those attached to the convening authority as well as civilian lawyers highly placed in the Department of Defense, have flouted this rule.

(2) There is at least one known instance where the Chief Prosecutor's professional judgment was unlawfully coerced or influenced with respect to Mr. Khadr specifically. In January 2007, the United States was under tremendous political pressure from Australia to charge David Hicks – so much so that Mr. Haynes successfully pressured COL Davis to begin drafting charges before the Manual listing the elements of the offenses had even been published. *Hamdan* R. at 730-37. Mr. Haynes also indicated that it was important for political reasons to charge other detainees along with David Hicks. *Id.* at 733. For weeks, COL Davis objected to charging any detainees before the commission process had been set up. *Id.* at 731-35. Mr. Haynes overruled these objections and charges against Mr. Hicks, Omar Khar and Salim Hamdan were preferred the day after the Manual for Military Commissions was published. MCM (18 Jan 08); *United States v. Hicks*, Sworn Charge Sheet (Attachment E); *United States v. Khadr* Sworn Charge Sheet (Attachment A to D008, Def. Mot. to Dismiss); *United States v. Hamdan*, Charge Sheet (Attachment F). At the time, neither the convening authority nor the Regulation for Trial by Military Commission existed. *Hamdan* R. at 731-35; Dept of Defense News Release No. 151-07, Feb. 7, 2007 (Attachment G) (announcing appointment of Convening Authority). The degree of political pressure involved is demonstrated by the fact that Mr. Hicks was brought to trial before the military commission system had been established. M.C. Reg. (published on 27 April 2007, 28 days after Hicks was convicted); *Jawad* R. at 8. This reveals that politics, not considerations relating to the merits of cases or justice, was the driving factor in charging these detainees on 2 February 2007. COL Davis testified in Mr. Hamdan's trial that absent this unlawful influence he would not have charged Mr. Khadr and Mr. Hamdan when he did and he would not have tried Mr. Hicks at all. *Hamdan* R. at 736-37, 782. These facts demonstrate the Mr. Khadr's case has been tainted by actual unlawful influence since its very inception.

(3) BG Hartmann also created at least the appearance of unlawful influence by injecting himself into the government's briefing of its appeal to the CMCR on the dismissal of charges in Mr. Khadr's case. The government filed its brief on 4 July 2007, but the Department of Justice (DoJ) was dissatisfied with it. *Jawad* R. at 15; Britt Statement at 6-8. BG Hartmann had discussions with DoJ and, at BG Hartmann's insistence, LTC Britt about whether to supplement or substitute the brief. *Jawad* R. at 15-16; Britt Statement at 6-8. The full extent of BG Hartmann's involvement in the appeal process is unknown to the defense. The Legal Advisor has no role in the appeal process under either the MCA or Rules for Military Commission. Thus, he had no legitimate authority to be involved. His involvement therefore suggests that he had a vested interest in an outcome favorable to the government. Particularly

given BG Hartmann's efforts to align himself with the prosecution as discussed in detail below, inserting himself into the appeal process would cause a disinterested observer, fully informed of all the facts and circumstances, to have significant doubt about his ability of objectively advise the convening authority and the fairness of these proceedings.

e. Department of Defense officials charged with overseeing the military commissions have undermined public confidence in the fairness of the entire process by directing the Chief Prosecutor's actions in the charging process and by making statements to the Chief Prosecutor that are wildly at odds with procedural fairness and inconsistent with the Department of Defense' obligation to conduct just trials.

(1) There is a pattern of unlawful interference with the professional judgment of prosecutors for political purposes both on a macro level affecting the military commissions generally and a micro level affecting specific cases. Given the nature and extent of the interference – both in terms of the senior levels the pressure comes from within DoD and how pervasive it is – this results in the appearance of unlawful influence with respect to this case.

(2) Indeed, military courts have found that general statements directed at subordinates can reach the level of unlawful influence even if the inappropriate communication in question does not directly mention the case improperly influenced. For example, in *United States v. Mabe*, 33 M.J. 200, 201-04 (C.M.A. 1991), a letter from one judge to a subordinate judge expressing concern about excessive leniency of sentences, was considered sufficient evidence of unlawful influence even without any reference to the pending trial. Here, the statements in question were far more outrageous: as discussed below, they suggested that particular charges be brought and particular verdicts be reached for political purposes.

(3) "Real or perceived policy considerations in the operation of military departments have no place in determining the guilt or innocence of an individual charged with a crime under the laws of our land." *United States v. Hagen*, 25 M.J. 78, 88 (C.M.A. 1987). Statements by high-level DoD officials to the Chief Prosecutor over the course of at least two and one-half years are wildly at odds with procedural fairness and conducting just trials. These statements cast into significant doubt the fairness of the military commissions.

(i) COL Davis first saw the "mortal enemy of military justice" rear its ugly head during his interview for the position of Chief Prosecutor in August 2005. During the interview, Mr. Haynes expressed open disapproval at the very notion that there could be acquittals in cases tried by military commission: "We can't have acquittals. If we've been holding these guys for years, how are we going to explain acquittals? We can't have acquittals. We've got to have convictions." *Hamdan* R. at 725; *see also* Morris D. Davis, AWOL Military Justice, L.A. Times, Dec. 10, 2007. This statement was made in response to COL Davis' observation that the existence of some acquittals at Nuremberg had bolstered public confidence in the trials there. Mr. Haynes' attitude toward the prospect of acquittals communicated to the Chief Prosecutor casts serious doubt on the fairness of the entire military commission process.

(ii) Mr. Haynes was not the only Department of Defense official to express prejudicial views to COL Davis when he was serving as Chief Prosecutor. According to COL Davis, Deputy Secretary of Defense Gordon England also stated at a meeting of the Senior

Oversight Group (SOG) that "there could be some real strategic political value in charging some of the high-value detainees before the [November 2006] elections and we need[] to think about who we can charge, what we can charge them with, and when we can charge them." *Hamdan* R. at 737-39; *Jawad* R. at 5-6. He also expressed frustration that the trial process was not moving faster since the Nazi Saboteur cases "were done in a matter of weeks." *Hamdan* R. at 737-39; *Jawad* R. at 5-6. These concerns were also expressed at other SOG meetings in late 2006 and early 2007. *Hamdan* R. at 753; Josh White, *Ex-Prosecutor Alleges Pentagon Plays Politics*, Wash. Post, Oct. 20, 2007, at A03 [hereinafter *Pentagon Plays Politics*] (Attachment D). These incidents demonstrate a pattern of interference with the professional duties of the Chief Prosecutor by high-level government officials due to blatant political calculations.

(iii) These statements of senior officials overseeing the commissions process would lead any disinterested observer to suspect that Mr. Khadr's prosecution was tainted by unlawful influence. Whether or not the statements of Mr. Haynes, Deputy Secretary England or others actually influenced the prosecutor, they are now a matter of public record. In particular, Mr. Haynes' insistence that acquittals were an impermissible result creates a strong appearance of impropriety and serves to undermine public confidence in the entire proceeding.

(4) Unlawful interference in the commissions process has been so pervasive that it extends to (i) the selection of general types of cases, (ii) the selection of specific cases, (iii) the order that charges would be preferred, (iv) the timing charges would be preferred, (v) the drafting of charges to be preferred; (vi) the assignment of prosecutors, and (vii) what evidence the prosecution will offer at trial.

(i) *The selection of general types of cases*. COL Davis adopted a policy of first bringing cases that could be tried without classified evidence. He based this decision on his professional judgment that open, transparent trials were in the interests of justice and preferable to closed trials. *Hamdan* R. at 758; *Pentagon Plays Politics*. But BG Hartmann pressured COL Davis not to take the time to declassify evidence and to instead bring cases that could be tried in closed sessions so that they could get "convictions and good sentences" quickly so that things did not "implode." *Hamdan* R. at 758-59. BG Hartmann also insisted that the first cases "capture the public's imagination" and have "blood on them" or be "sexy." *Hamdan* R. at 752; *Jawad* R. at 29-30; Davis Complaint, para. 15; Britt Statement at 11. As a result of these pressures, the Deputy Chief Prosecutor "reprioritized cases." Britt Statement at 12. Both of these criteria for selecting cases are political considerations that have no place in a fair proceeding. Charging decisions should instead be based on factors relating to justice and the merits of the case. But here, the Office of the Chief Prosecutor was successfully coerced into setting aside these considerations by a Legal Advisor who had a duty to "be, and appear to be, objective."

(ii) *The selection of specific cases.* BG Hartmann's involvement in selecting which detainees would be charged was not limited to defining general categories. He has also decided which specific detainees would and would not be charged. BG Hartmann especially liked the case against Mohammed Jawad, which involved the alleged throwing of a hand grenade at two U.S. servicemen and their interpreter. *Hamdan* R. at 753; *Jawad* R. at 46-47. But when COL Davis told him that the next cases he planned to charge were al Bahlul, al Qosi and al Darbi, BG Hartmann insisted that it be Jawad even though he was not on COL

Davis's list of the next 25 or 26 cases to be charged. *Jawad* R. at 42-46. Because of this pressure, Jawad "went from the freezer to the front burner after General Hartmann arrived." *Id.* at 47; *see also* Britt Statement at 12. Jawad was the next detainee charged. Charges were preferred against him on 9 October 2007. *United States v. Jawad*, Charge Sheet (Attachment N). And there were also detainees that the prosecution had selected to prefer charges against, but BG Hartmann directed them not to do so. Britt Statement at 11. Again, the decision to prefer charges was made by BG Hartmann not on the basis of factors relating to justice and the merits on the case, but on the basis of impermissible political considerations.

(iii) *The order that charges would be preferred.* BG Hartmann's involvement in the prosecution office also included defining "the sequence in which cases would be brought." *Pentagon Plays Politics* at A03. BG told the Deputy Chief Prosecutor that he (BG Hartmann) "was going to pick the next cases." *Jawad* R. at 29-30; Davis Complaint, para. 15; Britt Statement at 11. And, as discussed above, he said he was going to do it on the basis of considerations that have no place in fair proceedings. Due to this pressure, the Deputy Chief Prosecutor "reprioritized cases." Britt Statement at 12.

(iv) *The timing charges would be preferred.* At the 15 August meeting, BG Hartmann ordered COL Davis to have three cases ready to charge the day that the CMCR issued the Khadr decision in the government's appeal of COL Brownback's dismissal of the charges. *Id*. at 41; Davis Complaint, para. 26. BG Hartmann emphasized that it was imperative to "pick up the pace" otherwise "things were going to implode." Again, the pace of charging should not be driven by the political fears of an advisor who has a duty to "be, and appear to be, objective."

(v) *The drafting of charges to be preferred*. On 11 February 2008, charges were preferred against six detainees alleged to have conspired to attack the United States on 11 September 2001. Transcript of Press Conference of General Hartmann, 11 Feb 08 (Attachment P). The Convening Authority's office was apparently involved in the drafting of these charges as it had internally circulated draft charges two weeks earlier. Electronic Mail Message from COL Wendy Kelly, 29 Jan 08 (Attachment Q); *United States v. Hamdan*, testimony of Michael Berrigan at 1-3 (Attachment R). As discussed above, in establishing a Chief Prosecutor and in protecting prosecutors from coerced or unauthorized influence in the exercise of their judgment, Congress took the Convening Authority and those who work for her out of the preferral process. Their involvement in the preferral process raises the appearance of unlawful influence, particularly given the degree to which the Legal Advisor has directed prosecutorial decisions to achieve political ends.

(vi) *The assignment of prosecutors*. BG Hartmann was also involved in assigning prosecutors to cases. If he thought one counsel was not a strong advocate, he would ask to have another attorney assigned as lead counsel. *See Hamdan* R. at 751. As originally enacted, the UCMJ allowed the convening authority to appoint the military judge, trial counsel and defense counsel. At the time, the drafters of the UCMJ believed that "as long as you have lawyers in control of the trial, and a prohibition against any attempt to influence them unduly"

[3] But this did not prove to be true. So Congress stripped the convening authority of the power to appoint military judges and detail trial and defense counsel.[4] 10 U.S.C. § 826 (Oct. 24, 1968) (military judges); 10 U.S.C. § 827 (Dec. 6, 1983) (trial and defense counsel). By injecting himself into detailing decisions that have been reserved for the Chief Prosecutor, R.M.C. 501(b), BG Hartmann is increasing the doubt that an objective observer would have about the fairness of military commission proceedings.

(vii) *What evidence the prosecution will offer at trial.* Finally, BG Hartmann also injected himself into deciding what types of evidence the prosecution will offer at trial. COL Davis had a policy against using evidence obtained through water-boarding or that was otherwise unreliable. *See Hamdan* R. at 755-56. But BG Hartmann questioned COL Davis' authority as Chief Prosecutor "to make . . . decisions about what evidence the prosecution would offer" since people senior to COL Davis disagreed with him. *Id.* at 755. BG Hartmann took the position that prosecutors should not make the decision about whether evidence that they intend to offer at trial is reliable. *Id*. He insisted that evidence derived from water-boarding be offered into evidence by prosecutors. *Id*. Yet, in testifying before Congress he initially acknowledged that the decision of whether to introduce such evidence is at "the discretion of a prosecutor." Hartmann Senate Testimony at 9 (Attachment J). He then went back and forth on this, sometimes suggesting that the prosecutor would have the discretion to decide whether to introduce the evidence and sometimes suggesting that such evidence *would* be offered and that it would be up to military judges to determine whether it should be considered. *Id.* at 10, 15. Directing or appearing to direct COL Davis and other prosecutors to use evidence that they consider to be tainted or unreliable is an effort to impermissibly influence their professional judgment. Each prosecutor has an ethical obligation not to offer evidence he considers to be unreliable and BG Hartmann directly challenged COL Davis's authority to make that decision. That is unlawful influence.

---

[3] *Bills to Unify, Consolidate, Revise, and Codify the Articles of War, the Articles for the Government of the Navy, and the Disciplinary Laws of the Coast Guard, and to Enact and Establish a Uniform Code of Military Justice: Hearing on S. 857 and H.R. 4080 Before the Subcommittee of the Committee on Armed Services United States Senate*, 81st Cong. 164-65 (1949).

[4] The detailing of trial and defense counsel is now left to service regulations. 10 U.S.C. § 827. In both the Navy and Air Force, trial and defense counsel are detailed by the Commander Naval Legal Service Command and Chief of Government Trial and Appellate Counsel Division respectively. COMNAVLEGSVCCOMINST 5450.1E, Mission and Functions of Naval Legal Service Offices and Trial Service Offices (June 18, 1997); Air Force Manual 51-204, United States Air Force Judiciary (Jan. 18, 2008). Army regulations delegate the authority to detail trial counsel to the command staff judge advocate. Army Regulation 27-10, Military Justice (Nov. 16, 2005). Army defense counsel are detailed through the Army Trial Defense Service. *Id.*

(5) BG Hartmann's many public statements on his actions demonstrate that he has aligned himself with the prosecution.

(i) If there was any doubt that General Hartmann aligned himself too closely with the prosecutorial function when the Tate Investigation issued its findings on 17 September 2007, there can be none now. BG Hartman's own statements demonstrate that he abandoned his duty to maintain objectivity and assumed a prosecutorial role. He claims to have single handedly energized the prosecutorial effort. He openly compares his achievements during his tenure as *Legal Advisor* with those of the former *Chief Prosecutor*, COL Davis. In a 22 February 2008 interview on National Public Radio, BG Hartmann stated: "I've been in this job seven months, and as I said, Colonel Davis was able to bring three cases to trial in two years and in seven months—and in the last four months since Colonel Davis has been gone we have moved 10 cases." *A Twist in the Case Against Bin Laden's Driver* (NPR Feb. 22, 2008) (Attachment S). He then explained the recent surge in prosecutorial activity: "It's from me insisting that we move the process." *Id.* BG Hartmann made similar statements while testifying before the senate judiciary committee in December 2007. Hartmann Senate Testimony at 4 (attachment J). "If there has been an effort to increase the speed of the trials, the effort to improve the performance, an effort to improve the execution in the trial process, it has been my effort, and no one has directed me in that regard." *Id.* at 11. He further testified that, "The entire process is part of my concern, but my almost entire focus is on the trials and moving them, which was the beginning of your comment, Senator, that we have only tried one person. I want to change that record." *Id.* at 21. In these statements, BG Hartmann takes credit for the successes of the prosecution and suggests that he is their leader. BG Hartmann clearly viewed himself as being on the prosecution team. *Jawad* R. at 12; Davis Complaint, para. 16. In fact, he told the prosecution that one of his jobs was to be "in charge of the prosecution." *Jawad* R. at 11.

(ii) Indeed, the Deputy Chief Prosecutor "did very clearly feel" that BG Hartmann had taken over "the duties and the responsibilities that previously were COL Davis's" Britt Statement at 13. When COL Davis returned from convalescent leave, he began doing some of the Deputy's work since BG Hartmann was doing COL Davis' work. *Id*. Among other things, BG Hartman discussed prosecution cases with COL Davis daily and was "routinely engaged with the OCP in crafting charges, mustering evidence, developing trial strategy, honing prosecutor's skills, and sequencing cases." *Hamdan* R. at 752; *see* Davis Complaint, para. 6(b)(i); *see also* Britt Statement at 5 ("Almost immediately Hartmann asked for a complete report on everything 'A' to 'Z' that had to do with our prosecutorial operation, and immediately he requested a series of written documents that in the past we had been advised and our research had indicated should not be provided to the legal advisor"). All of this was for the purpose of trying to obtain convictions quickly that would be valuable for political purposes.

(iii) When BG Hartmann's directives were not followed, there was a price to pay. When COL Davis exercised his discretion to withhold information he believed might be discoverable if turned over to the Legal Advisor, BG Hartmann warned COL Davis that that "people get fired for that type of thing" and "it will not happen again. . . . Is that clear . . . Colonel!" Davis Complaint, para. 14; *Jawad* R. at 20. BG Hartmann's remark a clear invocation of his superior rank. Further, COL Davis has described BG Hartmann's treatment of prosecutors generally as "cruelty and maltreatment." *Hamdan* R. at 750. Certainly, this type of

atmosphere would cause an objective observer to conclude that if there was unlawful influence in any case, there was likely unlawful influence affecting every case.

(iv) BG Hartmann has done all of this while serving in an office requiring objectivity and neutrality. For the Legal Advisor to be actively engaged in the prosecution function – particularly to the extent that he is intimately involved in the details of day-to-day prosecutorial decision making – runs counter to his duty to provide objective and independent legal advice to the Convening Authority. This pattern of behavior is a threat to the integrity of the entire system of military commissions. It places an intolerable strain on the public perception of the system. *See United States v. Lewis*, 63 M.J. 405 (C.A.A.F. 2006). The strain in this case is already readily apparent:

> Moreover, Hartmann has now made the media rounds dramatizing the trials, denouncing the defendants as terrorist murderers who are finally seeing a glimpse of justice. Now, they may well be terrorist murderers who deserve to be prosecuted and receive severe sentences—but it is highly inappropriate for Hartmann to be making such statements. As legal adviser to the convening authority, any decisions in the case will be referred to him. And he has now publicly prejudged the cases, disqualifying himself under applicable ethical rules from playing the role which has been delegated to him. Even more to the point, the fact that a person who serves as a sort of appellate authority would be involved in the media spectacles designed to demonstrate the importance of the case against the accused reflects very poorly on the entire process, and will undermine public confidence in any result that it produces.

Scott Horton, *The Great Guantanamo Puppet Theatre*, Harpers Magazine, Feb. 21, 2008 (Attachment T).

(v) As BG Hartmann noted when testifying before the Senate Judiciary Committee, an accused "will also have the right to have his findings, if he's found guilty, and his sentence reviewed by the convening authority, impartially." *The Legal Rights of Guantanamo Detainees: What Are They, Should They Be Changed, and is an End in Sight?* 110th Cong. (Dec. 11, 2008) (statement of Brig. Gen. Thomas Hartmann). But the man who will advise her, and who continues to advise her in this case on issues such as the selection of members, the legal validity of the findings and the appropriateness of the sentence, is no longer impartial.

f. The Secretary of Defense cannot authorize unlawful influence of the Chief Prosecutor by subordinating through regulation the Congressionally created role of the Chief Prosecutor to the Legal Advisor of the Convening Authority, a position the Secretary of Defense created by Regulation.

(1) Unlike the UCMJ, the MCA does not contemplate a legal advisor. The MCA uses the terms "convening authority," "chief prosecutor," and "chief defense counsel." But the term legal advisor does not appear in the MCA. *Cf.* Art. 6, UCMJ, 10 U.S.C. 806 ("Convening authorities shall at all times communicate directly with their staff judge advocates or legal officers in matters relating to the administration of military justice."). The position of

Legal Advisor to the Convening Authority is a creation of the Secretary of Defense. *See* R.M.C. 103(a)(15); M.C. Reg. 2-1. Although Congress did not provide for a legal officer, the Secretary of Defense has inserted the position of legal advisor into the military commission process. The Secretary of Defense also purported to make the Legal Advisor the Chief Prosecutor's supervisor and rater. M.C. Reg. 8-6(b)(1).

(2) The Defense does not suggest that the Secretary of Defense could not have created a legal officer to advise the convening authority. But he cannot nullify the congressional intent to create an independent office of the Chief Prosecutor by subordinating the Chief Prosecutor to the Legal Advisor to the Convening Authority. Nor can he circumvent the congressional prohibition against unlawfully influencing the Chief Prosecutor by cloaking such conduct in the purported legality of a regulation. Yet the Tate Investigation concluded that BG Hartmann did not unlawfully coerce or influence the Chief Prosecutor because regulation permitted him to coerce and influence the Chief Prosecutor. Memorandum from Brigadier General Clyde J. Tate to the Hon. Jim Haynes dated Sept. 17, 2007 at 5(d) (Attachment K).

(3) Nothing in the plain language of § 949b or in the legislative history of the MCA suggests that Congress intended to subordinate the independent role and function of the Chief Prosecutor to functionaries later to be created by the Secretary of Defense. The creation of a Chief Prosecutor was itself a radical departure from the Uniform Code of Military Justice. And the congressional command that "no person" shall coerce or, without authorization, influence the Chief Prosecutor could not be plainer. If the Secretary of Defense can simply authorize coercion or influence of the Chief Prosecutor by regulation, what remains of the congressional prohibition against unlawful influence?

(4) Any attempt by the Secretary of Defense to authorize coercion and influence on the Chief Prosecutor is void *ab initio.* In cases of conflict, Manual provisions must yield to the statute. *United States v. Swift*, 53 M.J. 439, 451 (C.A.A.F. 2000). Federal statutes prevail over provisions of the Manual unless the Manual provision provides the accused with greater rights than the statute. *United States v. Lopez*, 35 M.J. 35, 39 (C.M.A. 1992). The Court of Appeals for the Armed Forces has routinely disregarded Part IV of the Manual for Courts-Martial when it conflicts with the statutory language of the UCMJ. *See e.g., United States v. Pritt*, 54 M.J. 47, 50 (C.A.A.F. 2000). In this case, the Secretary of Defense cannot disregard the congressional command that "no person" coerce or, without authorization, influence the Chief Prosecutor by simply authorizing the statutorily prohibited conduct. *United States v. Lopez*, 35 M.J. 35, 39 (C.M.A.1992) ("The military, like the Federal and state systems, has hierarchical sources of rights. These sources are the Constitution of the United States; Federal Statutes, including the Uniform Code of Military Justice; Executive Orders containing the Military Rules of Evidence; Department of Defense Directives; service directives; and Federal common law.").

(5) The omission of a legal advisor in the MCA was deliberate. As Steven Bradbury noted in his statement before the House Committee on Armed Services, the MCA "track[s] closely the procedures and structure of the UCMJ." *Hearing Before the House Armed Services Committee on the Military Commissions Act*, 109th Cong. 3 (2006) (statement of Steven G. Bradbury, Acting Assistant Attorney General, Office of Legal Counsel, Department of Justice). While Congress could have inserted Article 6 into the MCA, as it did with many other

provisions of the UCMJ, it elected not to do so. Instead, Congress created an office entirely foreign to military justice: Chief Prosecutor. 10 U.S.C. § 948k(d).

(6) Even if the Secretary of Defense was within his authority to subordinate the Chief Prosecutor to the Legal Advisor to the Convening Authority, unlawful influence still exists. Making the Legal Advisor a supervisor of the Chief Prosecutor and his subordinates does not mean that *any* influence he exerts on them is "authorized." If it did, to use an extreme example, that would mean that the Legal Advisor could require the prosecution to offer evidence that was derived from torture unbeknownst to the defense and that this would not amount to unlawful influence of the prosecutor's exercise of professional judgment. Therefore, even if the Legal Advisor could lawfully have *some* supervisory responsibilities over the Chief Prosecutor, he has taken those responsibilities too far here. The role BG Hartmann had created for himself far surpassed supervision to the point of "nano-management" and constitutes unlawful influence. *See Hamdan* R. at 750.

g. Given the actual unlawful influence exercised in the decision of when to bring charges against Mr. Khadr and the pervasive appearance of unlawful influence, this Commission should dismiss charges against Mr. Khadr.

(1) Command influence may assume many forms, may be difficult to uncover, and affects court members in unsuspected ways. *United States v. Karlson*, 16 M.J. 469, 474 (C.M.A. 1983). Where it is found to exist, judicial authorities must take those steps necessary to preserve both the actual and apparent fairness of the criminal proceeding. *Lewis*, 63 M.J. at 407. Military Judges are empowered to invoke a variety of remedies if they find a prosecution to be tainted by unlawful influence. These include dismissal of charges with or without prejudice. *See, e.g.*, *United States v. Gore*, 60 M.J. 178, (C.A.A.F. 2004) (dismissing charges with prejudice because the witness pool had been tainted by unlawful command influence in such a way that foreclosed the possibility of any fair trial). Dismissal of charges is appropriate when "the accused would be prejudiced or no useful purpose would be served by continuing the proceedings." *Gore*, 60 M.J. at 187 (citing *United States v. Green*, 4 M.J. 203, 204 (C.M.A 1978)). In this case, dismissal of charges is the only appropriate remedy. The unlawful influence casts a cloud over the entire proceeding that cannot be removed by even the most scrupulously fair conduct by the military judge and prosecution during the trial. In the instant case, repeated inappropriate actions by officials attached to the Convening Authority and officials in the chain of command of the Chief Prosecutor, have so compromised both the independence of the prosecution and the appearance of neutrality of the entire legal process that dismissal is the only adequate remedy. In the alternative, the defense requests that the Convening Authority and Legal Advisor to the Convening Authority be disqualified from further participation in this case.

6. Oral Argument: The defense requests oral argument as it is entitled to pursuant to R.M.C. 905(h) ("Upon request, either party is entitled to an R.M.C. 803 session to present oral argument or have evidentiary hearing concerning the disposition of written motions."). Oral argument will allow for a thorough consideration of the issues.

7. Witnesses and evidence: The Defense does not anticipate the need to call witnesses in connection with this motion, but reserves the right to do so should the Prosecution's response

raise issues requiring rebuttal testimony. The Defense relies on the following as evidence in support of this motion:

a. Attachments A through T.

8. Certificate of conference: The defense and prosecution have conferred. The prosecution objects to the relief requested.

9. Additional Information: In making this motion, or any other motion, Mr. Khadr does not waive any of his objections to the jurisdiction, legitimacy, and/or authority of this Military Commission to charge him, try him, and/or adjudicate any aspect of his conduct or detention. Nor does he waive his rights to pursue any and all of his rights and remedies in and all appropriate forms.

10. Attachments:

A. *United States v. Hamdan*, Military Commission Record of Trial (testimony of COL Davis)

B. Morris D. Davis, *AWOL Military Justice*, L.A. Times, Dec. 10, 2007

C. *United States v. Jawad*, Military Commission Record of Trial (testimony of COL Davis)

D. Josh White, *Ex-Prosecutor Alleges Pentagon Plays Politics*, Wash. Post, Oct. 20, 2007, at A03

E. *United States v. Hicks*, Charge Sheet

F. *United States v. Hamdan*, Charge Sheet

G. Dept of Defense News Release No. 151-07, Feb. 7, 2007

H. Sworn Statement of LTC Britt, 7 Sept 07

I. COL Davis 23 Sept 07 Complaint

J. *The Legal Rights of Guantanamo Detainees: What Are They, Should They Be Changed, and is an End in Sight?: Hearing Before Subcomm. on Terrorism, Technology and Homeland Security of the S. Comm. on the Judiciary* 110th Cong. (Dec. 11, 2007) (statement of BG Hartmann)

K. Memorandum from Brigadier General Clyde J. Tate to the Hon. Jim Haynes, 17 Sept 07

L. Memorandum for Chief Prosecutor, Office of Military Commissions, 3 Oct 07

M. Memorandum for Legal Advisor to the Convening Authority for Military Commissions, 3 Oct 07

N. *United States v. Jawad*, Charge Sheet

O. *States v. Hamdan*, Ruling on Mot. to Dismiss (unlawful influence), D-026

P. Transcript of Press Conference of General Hartmann, 11 Feb 08

Q. Electronic Mail Message from COL Wendy Kelly, 29 Jan 08

R. *United States v. Hamdan*, excerpt of testimony of Michael Berrigan

S. *A Twist in the Case Against Bin Laden's Driver* (NPR Feb. 22, 2008)

T. Scott Horton, *The Great Guantanamo Puppet Theatre*, Harpers Magazine, Feb. 21, 2008

/s/
William C. Kuebler
LCDR, JAGC, USN
Detailed Defense Counsel

Rebecca S. Snyder
Assistant Detailed Defense Counsel

UNITED STATES OF AMERICA	**D-075**
v.	**GOVERNMENT RESPONSE**
OMAR AHMED KHADR **a/k/a "Akhbar Farhad"** **a/k/a "Akhbar Farnad"** **a/k/a "Ahmed Muhammed Khali"**	**To the Defense's Motion to Dismiss** **7 August 2008**

1. **Timeliness:** This response is filed within the timelines established by the Military Commissions Trial Judiciary Rule of Court 3(6)(b).

2. **Relief Sought:** The Government respectfully requests the Military Judge deny the Defense Motion to Dismiss the Charges and Specifications for Unlawful Influence.

3. **Overview:** There was no unlawful influence in this case. The Legal Advisor was authorized to take all of the actions the Defense claims constitute "unauthorized influence," consistent with his roles as supervisor of prosecutors and the independent legal advisor to the Convening Authority. Additionally, the purported statements made by the Legal Advisor, General Counsel, and Deputy Secretary of Defense, even if true do not amount to undue influence and provide no grounds for relief for the accused.

4. **Burden of Proof:** As the moving party, the Defense bears the burden of persuasion. *See* Rule for Military Commissions (RMC) 905(c).[1]

---

[1] The decisions of the military courts interpreting the Uniform Code of Military Justice are not binding on this commission. *See* 10 U.S.C. § 948b(c). To the extent the court looks to the UCMJ for guidance, under court-martial practice, the Defense has the initial burden of producing sufficient evidence to show facts which, if true, would constitute unlawful influence, and that the alleged unlawful influence has a logical connection to courts-martial in terms of its potential to cause unfairness in the proceedings. *See Green v. Widdecke*, 19 U.S.C.M.A. 576, 579, 42 C.M.R. 178, 181 (1970) ("Generalized, unsupported claims of 'command control' will not suffice to create a justiciable issue."). The burden of disproving the existence of unlawful influence or proving that it did not affect the proceeding does not shift to the Prosecution until the defense meets its burden of production. *See United States v. Thomas*, 22 M.J. 388, 396 (CMA 1986), *cert. denied*, 479 U.S. 1085, 94 L. Ed. 2d 146, 107 S. Ct. 1289 (1987); *United States v. Rosser*, 6 M.J. 267 (CMA 1979). After the burden shifts to the Prosecution, the Prosecution must address two distinct issues: (1) what must be proven? and (2) what is the quantum of proof required? *See United State v. Biagase*, 50 M.J. 143, 151 (1999) ("The [Prosecution] may carry its burden (1) by disproving the predicate facts on which the allegation of unlawful command influence is based; (2) by persuading the military judge or the appellate court that the facts do not constitute unlawful command influence; (3) if at trial, by producing evidence proving that the unlawful command influence will not affect the proceedings; or (4), if on appeal, by persuading the appellate court that the unlawful command influence had no prejudicial impact on the court-martial.").

5. Facts.

The following facts supplement or clarify assertions contained in the Defense motion (D-075) (and the numbering corresponds to the paragraphs in the Defense motion).

a. Mr. Haynes did not say the words as quoted. He did tell Colonel Davis that the process would be under scrutiny and that the possibility of acquittals did not concern him. He made the decision to "hire" Colonel Davis for the position of Chief Prosecutor after this meeting. He spoke to trial and defense counsel several times during his tenure as Department of Defense General Counsel, always emphasizing their ethical duty to serve zealously and ethically in the roles they undertook.

c. The elections presumably referenced in the Defense filing were the Congressional elections of 7 November 2006. No charges had been sworn in any cases as of the meeting of 29 September 2006. Immediately after Deputy Secretary England made comments, Mr. Haynes, the DoD General Counsel, and one of about 16 persons present at the meeting, cautioned all in the group that the decisions on whom to charge and when to charge were the decisions of the Chief Prosecutor. Colonel Davis, present at the meeting, made no comments and was satisfied with Mr. Haynes prompt instruction to all present.

e. Mr. Haynes asked Colonel Davis about charging David Hicks because Colonel Davis frequently had mentioned Mr. Hicks to him as a case ready to charge.

f. Mr. Haynes did not at any time ask Colonel Davis "to charge a few additional detainees along with Mr. Hicks."

g. Mr. Dell'Orto does not recall having made such a phone call to Colonel Davis.

p. The term "sexy" did not originate with BGen Hartmann but was a term used by Colonel Davis and others to signify cases that would capture public attention. Similarly, referring to cases with "blood" on them was understood by prosecutors, including Colonel Davis, as reflecting a case of sufficient gravity that it warranted expenditure of finite prosecutorial resources.

u. and v. BGen Hartmann did not "insist[] that such decisions be left to military judges," but he did say, to the staff as well as in Congressional testimony, that reliability was properly the concern of the prosecutor while the judge, under the rules, had final call to evaluate the admissibility of the evidence "in the best interests of justice." BGen Hartmann never told Colonel Davis to have prosecutors present cases derived from torture or other questionable evidence; they had no conversations on this topic.

x. Colonel Davis delivered his complaint to Judge Crawford's office on a Friday, and on Monday she called to tell him that she had presented it to Mr. Haynes, the DoD General Counsel, earlier that morning; she did not consider it a matter for the Inspector General, though Colonel Davis remained free to present it directly to the IG at any time.

She also told Colonel Davis that she had directed that neither BGen Hartmann nor Mr. Michael Chapman, staff director for the Office of Military Commissions (who also served as Acting Legal Advisor in the Legal Advisor's absence) would serve as legal advisor on any pending cases until the matters raised in Colonel Davis's complaint were resolved. She named Mr. Ron White, an attorney on her staff, to perform those functions in the meantime.

bb. Colonel Davis did not "resign;" Colonel Davis asked that he be relieved and on 5 October 2007 he was relieved of his duties.

Additional facts:

i. The Convening Authority reports to The Deputy Secretary of Defense.

ii. Omar Khadr was originally charged on 4 November 2005, and charges were pending against Khadr when the Convening Authority stayed all charged military cases in light of the Supreme Court ruling in Hamdan v. Rumsfeld on XX June 2006.

iii. Prior to, and upon passage of the Military Commissions Act, Colonel Davis directed Prosecutors assigned to OCM-P to continue perfecting cases so that they were prepared to charge shortly after legislation was passed.

iv. Colonel Davis never directed the swearing of charges in any particular case, including Khadr, prior to the Prosecutor making the decision to swear charges.

6. Law and Argument:

The alleged actions of the Legal Advisor to the Convening Authority have not unlawfully influenced the Prosecution

a. The Military Commissions Act (MCA) provides that no person may attempt to coerce or by *any unauthorized* means influence the exercise of professional judgment by trial counsel or defense counsel. 10 U.S.C. §949b(a)(2)(c). Of course, implicit within this section of the statute is the recognition that there may be persons who may influence both trial and defense counsel by *authorized* means. All of Brigadier General Hartmann's actions, as averred by the Defense, were authorized by and consistent with the MCA, the Manual for Military Commissions (MC), well established principles of military jurisprudence and generations of military practice.

b. As stated in footnote 1, decisions of military appellate courts are not binding on this Military Commission. To the extent the Military Judge wishes to incorporate unlawful command influence analysis under Article 37 UCMJ case law, the starting point for any claim is to weigh the Defense allegations and determine whether these

allegations, if true, would amount to unlawful command influence. [2]

c. Moreover, the positions of the SJA and the Legal Advisor, as they relate to the specter of unlawful command influence, differ in significant respects. For example, in typical military justice matters a court-martial convening authority's primary responsibility is for the good order and discipline of his subordinate troops; to assist him in these duties he has a "core *staff*" which is often composed of a Chief of Staff, functional staff officers, and, among others, a Staff Judge Advocate (SJA). In contrast, the Convening Authority for Military Commissions has only the limited authority to make determinations on certain matters regarding military commissions, and has no other military role. The Convening Authority possesses no "core staff" in the military sense of the term, and as such was not given a "Staff Judge Advocate." However, the Legal Advisor to the Convening Authority operates in a nearly identical manner to a Staff Judge Advocate on matters relating to justice.

d. The Secretary of Defense acted pursuant to explicit authority contained in the Military Commissions Act (MCA) in fashioning the position of Legal Advisor, a lawful exercise of his authority as head of the Department of Defense, and consistent with the tradition and functions of the SJA in military practice.[3] The MCA empowers the Secretary of Defense to promulgate procedures for military commissions "so far as [he] considers practicable...[that] apply the principles of law...in trial by general court-martial." The MCA specifically gives the Secretary of Defense the authority to draft *pre-trial* procedures that apply the principles of law in trial by general courts-martial. See 10 U.S.C. §949a(a). Such pretrial procedures properly entail the Legal Advisor's responsibilities for supervision of the Chief Prosecutor, as well as the Legal Advisor's responsibilities to draft pretrial advice on the sufficiency of the sworn charges; both common responsibilities of Staff Judge Advocates, reinforced and define by statute, regulation, and historic practice.

e. The role of the Staff Judge Advocate under the Uniform Code of Military Justice (UCMJ) is the precursor to and the equivalent of the Legal Advisor to the Convening Authority for the military commissions process. Just as the Manual for Courts-Martial requires the SJA to give independent legal advice on jurisdiction, sufficiency of the evidence and other factors[4], RMC 406 requires the Legal Advisor to make similar recommendations to the Convening Authority. Just as Article 36 of the UCMJ delegates the rule making authority to the President, Sec. 949a(a) of the MCA delegates rule-making authority to the Secretary of Defense.

---

[2] The burden of disproving the existence of unlawful influence or proving that it did not affect the proceeding does not shift to the Prosecution until the defense meets its burden of production. *See United States v. Thomas*, 22 M.J. 388, 396 (C.M.A. 1986), *cert. denied*, 479 U.S. 1085 (1987); *United States v. Rosser*, 6 M.J. 267 (C.M.A. 1979).

[3] 10 U.S.C. sec 9(a).

[4] See Rule for Courts-Martial 406(b)

f. There is nothing in Brigadier General Hartmann's conduct, even as characterized by the Defense, that calls into question his ability to provide the legal advice required under the Manual for Military Commissions. His role as a supervisor of the prosecution is complementary to, not in conflict with his role as the legal advisor to the Convening Authority; the requirement to bring justice is present in both circumstances. Furthermore, the Defense fails to cite a single case where the Legal Advisor improperly pressured a trial or defense counsel.

g. For a Legal Advisor (SJA) to be disqualified, he must so thoroughly abandon any pretense of impartiality that his ability properly to give advice to the Convening Authority is unalterably compromised. In this case, the Defense complains simply that the Legal Advisor's supervision of the prosecution effort has been exacting and intensive, not that it has been unethical or in any sense inconsistent with the supervisory functions historically exercised by an SJA, who also serves as the legal advisor to a commander or convening authority.

h. The Defense must prove a nexus between the actions of the legal advisor to the Convening Authority and some legally cognizable harm to the accused.[5] In the present case, the facts alleged by the Defense, even if presumed true, do not amount to unlawful influence. Even if the facts were as represented by the Defense, they reflect the Legal Advisor's complementary role, one deeply rooted in military law, by which the Legal Advisor (Staff Judge Advocate) also supervises the prosecution effort. The Defense has failed to meet their initial threshold requirement alleging unlawful influence, and no further analysis is necessary to deny this motion.

Mr. Haynes did not unlawfully influence Colonel Davis or any trial counsel's professional judgment

i. The Defense brief claims "there is at least one known instance where the Chief Prosecutor's professional judgment was unlawfully coerced or influenced with respect to the accused." Def Mot. at 11. Citing Colonel Davis' testimony in the Hamdan case, the defense alleges that Mr. Haynes indicated that it was important for political reasons to charge other detainees along with David Hicks. Even assuming arguendo that this statement was true[6], it would not amount to unlawful influence. There is not even evidence that the case was referred earlier than might otherwise have occurred (and even the defense concedes there was no communication between Mr. Haynes and the Legal Advisor or Convening Authority). There is no question that this case would have been referred to trial. The Khadr case was originally charged in November 2005 and was

[5] *United States v. Reynolds*, 40 M.J. 198, 202 (C.M.A. 1994).

[6] The Government notes that Mr. Haynes has stated he has no recollection of making such comments. See attached Declaration of William J. Haynes II, dated 16 June 2008.

proceeding to trial until the Hamdan v. Rumsfeld decision in June 2006. Colonel Davis himself agrees that the Hamdan and Khadr cases would have been charged in any event. Despite repeated opportunities to provide comments, whether before Military Commission or the press, Colonel Davis has never alleged the Khadr case should not have been referred for trial or that he was improperly influenced in any manner related to the Khadr case. The accused has not been harmed in any manner by the statements alleged to have been made by Mr. Haynes, of the actions of Brigadier General Hartmann, therefore, no unlawful influence exists.

No appearance of Unlawful Influence Exists

j. Having failed to prove actual unlawful influence, the Defense has no basis for asserting apparent unlawful influence. The concept of apparent unlawful influence does not exist in the MCA, the MMC, or any of the regulations promulgated by the Secretary of Defense; as a matter of judicial construction of the UCMJ, such decisions are expressly made not binding on this commission. *See* 10 U.S.C. § 948b(c). Moreover, the concerns upon which the unlawful command influence are based, have little applicability to the context of military commissions being used to prosecute our Nation's enemies. Whereas it may be appropriate to find apparent unlawful command influence even in the absence of prejudice to a member of our Armed Forces, such a broad and undefined concept is out of place when it can be used or easily manipulated by those at war with the United States.[7]

k. The Defense cites numerous allegations arguing that actions taken and statements allegedly made by the Legal Advisor, the Department of Defense General Counsel and the Deputy Secretary of Defense have created an impermissible "appearance of unlawful influence."

l. Initially, the Defense alleges BGen Hartmann "inject[ed] himself" into the government's briefing of its appeal to the CMCR on the dismissal of charges in the Khadr case. BGen Hartman had no input into the motion to reconsider the Military Judge's 4 June 2007 dismissal of charges or subsequent appeal

m. The Defense then alleges that during Colonel Davis's "job interview" for the position of Chief Prosecutor, Mr. Haynes comments suggested that he would disapprove of acquittals in Military Commission cases. Mr. Haynes specifically contests these statements. Even assuming the statement was made, Colonel Davis was unaffected and decided to accept the position as Chief Prosecutor.

n. The Defense cites a comment by Secretary England suggesting there would be strategic political value in charging some high-value detainees before the November 2006 elections. Colonel Davis was similarly unaffected by this comment and proceeded to direct the preparation of charges by Prosecutors assigned to the Office of Military

[7] The Prosecution notes that even in the court-martial context, the burden for proving apparent unlawful command influence is high to guard against baseless allegations. *See, e.g., United States v. Lewis*, 63 M.J. 405, 415 (2006).

Commissions.

o. The defense then makes several additional allegations against Brigadier General Hartmann, including that he directed the selection of cases (both generally and specific), directed the order that charges would be preferred, directed the timing of charges, participated in the drafting of charges, assigned prosecutors, and directed the evidence prosecutors would offer at trial.

(1) Selection of types of cases. Brigadier General Hartmann never directed the selection of any type of case, and certainly not the Khadr case, long in development before Brigadier General Hartmann's July 2007 arrival.

(2) Selection of specific cases. Brigadier General Hartmann never directed the selection of any case and obviously not the Khadr case.

(3) Order charges would be preferred. BGen Hartmann never directed that cases be charged in a certain order.

(4) Timing charges would be preferred. BGen Hartmann never directed the timing of the charging of any cases, and certainly not the Khadr case.

(5) Drafting of charges to be preferred. BGen Hartmann did consult with the Chief Prosecutor on the drafting of charges and offered advice on his views of charging strategy and methodology, consistent with his role as supervisor; that involvement was minimal in Khadr..

(6) Assignment of Prosecutors. The Chief Prosecutor assigns prosecutors, not the Legal Advisor; there have been no exceptions to this practice.

p. Finally, the Defense suggests public statements made by Brigadier General Hartmann suggest that he has aligned himself with the Prosecution. While the defense is correct that BGen Hartmann has held press conferences, he has expressed no opinion as to the guilt or innocence of the accused (and in fact continuously emphasizes that they are to be considered innocent at this stage).[8] The need for factual and objective explanations

[8] The Defense cites an article (Defense Brief pg 17) by Scott Horton entitled "The Great Guantanamo Puppet Theatre" as "proof" that there is an intolerable strain on the public perception of the military commissions system. In this article, the author claims that BGen Hartmann denounced the defendants as "terrorist murderers who are finally seeing a glimpse of justice." The Prosecution challenges the Defense to present one shred of evidence that BGen Hartmann ever made such a statement. The article goes on to suggest that the *any* decisions in the case are to be referred to BGen Hartmann, and even cites to his role as "a sort of appellate authority" (both of which are either patently incorrect or, at the very minimum, misleading). While there very well may be a strain on the public perception of the military commission system, it is in no small part caused by reckless insinuation and falsehoods spread by such articles. While the authors clearly have the right to publish such articles, regardless of whether they are true, the Defense is surely aware of the inaccuracies in the article. Such evidence to support their argument that there is a strain on the public perception of the military justice system should carry zero weight with this commission. No doubt there are equally polemical articles from the contrary perspective that the

about the military commission process, and the robust protections it affords to those accused, is an important and proper role for the Legal Advisor. None of these actions has created any reasonable appearance of unlawful influence.

Distinctions between the instant case and the case of *United States v Hamdan*

q. The Defense cites to findings of fact and conclusions of law by Judge Allred in *United States v Hamdan*. Defense Motion at 19. Notwithstanding the fact that such findings and rulings of law are not binding precedent on another military commission, there are many distinctions in the alleged involvement of the Legal Advisor in the two cases that warrant denial of the defense motion in this case.

r. In the *Hamdan* case the Military Judge was specifically concerned about BGen Hartmann's intention to enter into pretrial negotiations with the defense counsel. No such allegation has been made in the instant case. Judge Allred also was concerned with BGen Hartmann's supposed direction that certain cases be tried; no such allegation arises in this case, as the prosecution of the accused had been in preparation long before the BGen Hartmann's arrival. Finally, Judge Allred was concerned that the Chief Prosecutor and the two prosecutors on the *Hamdan* case felt they were being "nano-managed" and one even requested an ethical opinion due to BGen Hartmann's involvement *in that case*. No such allegations exist for this case.

The remedy requested by the Defense offends notions of justice.

s. Defense counsel claim that the proper remedy for Brigadier General Hartmann's involvement in this case, a case that was years into its preparation prior to his arrival, is to dismiss the charges with prejudice, ensuring that the accused will never be tried by the United States for his actions. Were there any cause for relief, it would not warrant such a disproportionate and ludicrous remedy.

t. There are a host of lesser remedies, well developed in military case law, that fall well short of the Draconian measure of dismissal of charges or disqualification of a participant. While none is warranted in this case, the Prosecution would urge the opportunity to address such options should the Military Judge find it appropriate to do so.

7. **Request for Oral Argument:** The Government requests oral argument.

8. **Witnesses and Evidence:** All of the evidence and testimony necessary to deny this motion is already in the record.

---

government will not cite, because no such articles are relevant to the issue of apparent command influence, which is evaluated from the perspective of a reasonable observer *knowing all the facts*.

9. **Certificate of Conference:** Not applicable.

10. **Additional Information:** None.

11. **Attachments:**

12 June 2008 Declaration of Mr. William J. Haynes II

12. **Submitted by**:

Jeffrey D. Groharing
Major, U.S. Marine Corps
Prosecutor

Keith A. Petty
Captain, U.S. Army
Assistant Prosecutor

John F. Murphy
Assistant Prosecutor
Assistant U.S. Attorney